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IN THE

Supreme Court Of The United States

No. 75-912

Johnnie Slingerland ..... *Petitioner*

V.

United States of America ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above - Entitled case on October 30, 1975.

JURISDICTION

The Judgment of the Circuit Court of Appeals was returned on October 30, 1975. An extension of time for filing the instant Petition was granted on November 26, 1975, extending to December 29, 1975, the time for filing the instant Petition. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether the evidence presented against Petitioner was sufficient to overcome Petitioner's presumption of innocence so that Petitioner's constitutional rights afforded by the Fourteenth Amendment to the Constitution of the United States were fully protected.

STATUTE INVOLVED

The statutory provisions involved are 18 U.S.C. 371, 18 U.S.C. 152. They are printed in Appendix A, infra, P.P. .

STATEMENT

An Involuntary Petition in Bankruptcy was filed against Factory Surplus and Freight Sales, Johnnie Lee Slingerland and William Francis Wilson, on May 10, 1974. The jurisdiction of the District Court was invoked because the case in point, 18 U.S.C. 371, arises under Section 152, 18 U.S.C. to-wit: "Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal or other officer of the Court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or . . . "

The Trustee was appointed on June 18, 1974 and proper bond was made. At the time the Petition for Involuntary Bankruptcy was filed, F.S.F.S., Slingerland and Wilson, were in fact still doing business. Creditors

were being paid, bank accounts were still being operated, payrolls were still being met.

Testimony adduced at the trial in District Court was to the effect that General Electric Finance had factored the commercial paper for F.S.F.S. and that a great majority of the accounts were good. General Electric, for no good reason, and without notice, substantially reduced the amount of credit to be extended to F.S.F.S. After persuasion *by Slingerland*, (emphasis added.) General Electric agreed to factor as much as $10,000.00 of commercial paper each month. At the time of this agreement, F.S.F.S. had already factored this amount and this was approximately the tenth of the month. The effect, therefore, was to eliminate any further sales, except cash transactions, for the particular month and to substantially reduce any future commercial transactions on the part of F.S.F.S. In effect, F.S.F.S. was put out of business, *and for no valid reason nor was it due to any action* on the *part* of *Petitioner*. (Emphasis added). The point is also made here that Petitioner offered to put up a substantial amount *of his* own *money* (emphasis added) as an inducement for General Electric to maintain their level of credit.

In order to save F.S.F.S., Petitioner began selling furniture to individuals by pieces and lots. As money was received, it was deposited and creditors were paid. In fact, just shortly prior to the filing of the Involuntary Bankruptcy by three or four creditors, one of the creditors who filed had been paid by Petitioner.

Trial was held in District Court, by Jury. The government case consisted of voluminous documents and over sixty witnesses, mostly dealers who had done business with Petitioner and F.S.F.S. *Not one*, (emphasis added), witness of any creditable status testified as to any wrong doing on the part of Petitioner. In fact, many testified as to Petitioner's good credit and business ability and stated they would do business with Petitioner again. One witness, Wilson, testified that a conspiracy had originally been agreed to and carried out. This witness admitted to prior acts of wrongdoing that involved perjury, intimidating Government witnesses, stealing, and that the Government was going to help him not only in the instant case but also in other federal jurisdictions as well as possible state charges.

On appeal to the Eighth Circuit, Petitioner's counsel had barely three minutes to plead Petitioner's case. The three judge panel upheld Petitioner's conviction on the Eighth Circuit's policy that a conspirator can be convicted solely on the *uncorroborated testimony* of a *co-conspirator* (emphasis added). This, says Petitioner, is contrary to the spirit of due process and does deprive Petitioner of his full rights under the 14th Amendment to the Constitution of the United States.

In the instant case, the testimony of Wilson is totally uncorroborated. His testimony was as self-serving as any testimony could possibly have been. Wilson even exonerated two others, Paul Jarnigan and James Micciche, one of whom was related to Wilson and the Eighth Circuit reversed the convictions of Jarnigan and Micciche.

REASONS FOR GRANTING THE WRIT

I.

This trial was very complicated, long, drawn out, very difficult for legal practitioners to comprehend, much let alone a jury of laymen.

"The comprehensiveness and indefiniteness of the offense of conspiracy has made an exact definition a very difficult one." *Commonwealth v. Donahoe*, 250 Ky 343, 347, 63 S.W.2d 3, 5 (1933). "It (conspiracy) almost defies definition." - Mr. Justice Jackson in *Krulewitch v. U.S.*, 336 U.S. 440, 446, 69 S. Ct. 716, 719, 720 (1949).

Due process demands that one receive a fair, impartial and complete understanding of the charges against him. As stated by the learned Justice Jackson, Supra., conspiracy practically defies definition. In the case of Petitioner, it is clear that he did not receive a fair and intelligent understanding of the facts by this particular jury.

II.

In *Hyde v. U.S.*, 225 U.S. 347, 32 S. Ct. 793 (1912) the Court held that overt actions done are a part of the conspiracy. What overt actions done by Petitioner suggest that they, the acts, are part of a conspiracy to defraud? The overt act of convincing General Electric to increase the amount of commercial paper General Electric would factor? The overt act of offering to put up

a substantial amount of his own money? The overt act of selling furniture by pieces and lot, at reasonable prices, and paying creditors?

There must be *more than* (emphasis added) an agreement. *18 U.S.C.A.*, Section 371; West's Ann. Cal. Pen. Code, Section 184. Also, *Hyde v. U.S.*, 225 U.S. 347, 32 S. Ct. 793 (1912)

III.

The due process Clause of the 14th Amendment is not limited to those specific guarantees spelled out in the Bill of Rights but rather contains protection against practices and policies which may fall short of fundamental fairness without running afoul of a specific provision. *In re Winship*, 397 U.S. 358, 377 (1970). What is fair or reasonable about summarily holding that a conspirator can be convicted on the total uncorroborated testimony of an alleged co-conspirator? Even most states hold that without corroborating evidence one cannot be convicted on the uncorroborated testimony of a co-defendant. Surely, if State Courts can recognize the damages in this type of criminal conviction, our Federal Judiciary should be even more cognizant of the protection of individuals in this sort of criminal prosecution.

IV.

The decision of the Court of Appeals was given after a review of the transcript, five volumes, and oral

argument that consisted of barely three minutes by Petitioner's counsel. Is this adequate to protect Petitioner's rights and also to guarantee Petitioner the degree of fairness to which he is entitled? Hardly.

V.

It has been said by the learned Professor Perkins, "the substantive acts of one conspirator in *furtherance of the conspiracy*, must be imputed to his co-conspirators insofar as *they were members of the conspiracy at the time the acts were committed.*" (Emphasis added). *Perkins, The Act of One Conspirator*, 26 Hastings L.J. 337-359 (1974).

Taking the record as a whole, what substantive acts of Petitioner, in furtherance of a conspiracy, were imputed to co-conspirators at the time the acts were done? What acts at all were done in furtherance of a conspiracy to defraud creditors?

If we are to hold the acts done by Petitioner in the instant case as those acts of a conspirator in furtherance to defraud creditors, then our entire economic structure, as it relates to business of this nature, might just as well be done away with. It is a well settled principle of business, in the surplus and salvage trade, that factoring of commercial paper is essential if that business is to continue. Without it, there can be no trade of this nature. What, for example, would happen to General

Motor Corporation if suddenly their credit line was substantially reduced? Would you then hold the corporate officers liable for conspiracy to defraud creditors if steps were taken to sell merchandise, for reasonable prices, to maintain the business?

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

1. 18 U.S.C. Sect. 371—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. Sect. 152—Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or . . . .

APPENDIX B

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
FILED
OCT. 30, 1975
Robert C. Tucker
Clerk

No. 75-1224 September Term, 1975

United States of America,

Appellee,

vs.

Johnnie Lee Slingerland,

Appellant,

Appeal from the United States District Court for the Eastern District of Arkansas

Paul Ray Jarnigan,
William Francis Wilson,
Frank Douglas Ward,
Joseph Micciche, Sr.

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Arkansas and typewritten briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

October 30, 1975

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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No. 75-911
No. 75-912

Johnnie Slingerland ..... *Petitioner*
Frank Douglas Ward ..... *Petitioner*

V.

United States of America ..... *Respondent*

APPENDIX TO PETITION

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IN THE

Supreme Court Of The United States

No. 75-911
No. 75-912

Johnnie Slingerland ..... *Petitioner*
Frank Douglas Ward ..... *Petitioner*

V.

United States of America ..... *Respondent*

APPENDIX TO PETITION

No. 75-1220
No. 75-1221
No. 75-1223
No. 75-1224

United States of America, Appellee,	*	Appeal from the United States District Court for the Eastern District of Arkansas.
v.	*	
Joseph Micciche, Sr., Paul Ray Jarnigan, Frank Douglas Ward, and Johnnie Lee Slingerland	*	
Appellants.	*	

Submitted: September 9, 1975.
Filed: October 30, 1975.

Before VAN OOSTERHOUT, Senior Circuit Judge; BRIGHT and ROSS, Circuit Judges.

PER CURIAM.

The four appellants challenge their conviction by a jury of conspiring to knowingly and fraudulently transfer and conceal assets in contemplation of a bankruptcy proceeding and with intent to defeat the bankruptcy law. 18 U.S.C. §152. The sole issue raised is sufficiency of the evidence. We affirm the convictions of appellants- William Ward and Johnnie Slingerland, but reverse those of Paul Jarnigan and Joseph Micciche, Sr.

There was clearly sufficient evidence to support the convictions of Ward and Slingerland. Government witness-William Wilson testified that he, Ward, and Slingerland expressly agreed to conduct a scheme to defraud creditors which he termed a "scam." The basic idea of the "scam" was to establish good credit, order a large inventory, dispose of that inventory for whatever it would bring, and then disappear.

This scheme was carried out essentially as planned. A furniture store was established in December of 1973, under the name of Factory Surplus and Freight Sales (FSFS). Several branch stores were also

established. FSFS did a rapidly increasing business in inexpensive furniture sold at very low prices. In April of 1974, a huge inventory began to arrive. Also, in mid-April, the company that had been financing many of FSFS' credit sales severely curtailed the amount of recourse paper it would accept.

Much of this inventory was stored in various places rented on a short-term basis. This inventory was then trucked to auction houses throughout the South and sold at prices substantially below wholesale. Many trucks were rented for this purpose. Wilson testified that one truck was purchased and that title was placed in Ward to conceal it from any bankruptcy proceedings.

By April 30, 1974, the FSFS store was completely emptied of furniture. On that day defendant-Slingerland, the nominal proprietor of FSFS, reported to city police that he had been robbed of $68,000 in cash. Some time prior to this alleged robbery, witness-Wilson told another witness that such a robbery would be claimed in order to account for the missing assets of FSFS. Although defendant-Slingerland reported the robbery to the police, he never provided a statement of the circumstances to them as requested. He explained at trial that this was because he did not care for the attitude of the police. The record indicates that the police seemed skeptical of his robbery report.

A petition for creditors for involuntary bankruptcy was filed against Wilson, Slingerland, and FSFS on May 10, 1974, and a receiver was appointed. On

June 27, 1974, an injunction was issued against defendants-Ward, Micciche, and Jarnigan forbidding them to dispose of any assets of FSFS. It is not clear when, if ever, the various defendants learned of these proceedings prior to the time criminal charges were brought against them.[1]

With respect to Ward and Slingerland, the testimony of witness-Wilson precludes any innocent interpretation of these facts. While it is true that Wilson's character was shown to be less than spotless, it is well settled that "a conviction can rest on the uncorroborated testimony of a co-defendant or accomplice." *United States v. Guy*, 456 F. 2d 1157, 1161 (8th Cir.), *cert. denied*, 409 U. S. 896 (1972); *Wood v. United States*, 361 F. 2d 802 (8th Cir. 1966). Further, Wilson's testimony was substantially corroborated. For example, the record shows that Wilson knew that Slingerland was planning a phony robbery some time prior to its occurrence. Other evidence in the record also serves to corroborate this direct testimony of an express conspiracy intended to defraud creditors and frustrate the bankruptcy laws.

The situation is quite different with respect to defendants-Jarnigan and Micciche. They were salesmen working for FSFS. Jarnigan also managed a branch of FSFS for a short time. Both were apparently extremely effective and successful as salesmen.

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[1]Slingerland admitted that he knew of the bankruptcy proceedings prior to his last attempt to auction FSFS furniture.

Although the Government concedes that Jarnigan and Micciche were not a part of the original conspiracy, it contends that they later joined the conspiracy. There is no direct evidence of this. Indeed, the Government witness, Wilson, testified that Jarnigan and Micciche were not involved in the scheme in any manner.

The Government relies upon four major pieces of evidence to implicate Jarnigan in the conspiracy. First, Jarnigan did buy a quantity of furniture from FSFS at a bargain price. However, Government witness-Wilson testified that this was a bona fide sale. He said that Jarnigan agreed to pay a substantial price and put down $900 in cash. Defendant-Slingerland also testified that this was an arm's length sale and that others had made similar purchases at a similar price. Further, the record contains a written receipt given to Jarnigan acknowledging the $900 payment. It is true that at one point, in talking to a policeman, Jarnigan did indicate that Slingerland would receive some of the profits of the sale of that furniture. However, this testimony is equivocal at best, since there was a substantial balance still owing to Slingerland.[2]

Second, Jarnigan was shown to have received a check for $465 that originated as proceeds from one of

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[2] The evidence that Jarnigan purchased a 41-acre farm was never related to the conspiracy. In view of the many commercial storage places used by the conspiracy, the inference, sought to be drawn by the prosecution, that the desire to conceal furniture motivated Jarnigan's purchase of the tract, rests upon mere conjecture.

the auction sales. However, the record reveals from disinterested testimony that this check had been delivered in blank to witness-Wilson, and Jarnigan's name and endorsement on the check were in a different ink. Wilson testified that this check represented a loan to Jarnigan.

Third, there is some evidence that Jarnigan admitted taking advantage of the confusion surrounding the collapse of FSFS to "steal" some furniture for his own purposes. The record, however, is unclear as to whether "steal" was Jarnigan's term or whether that was the conclusion of the witness. In any event, the fact that Jarnigan may have stolen furniture from FSFS does not show that he was a part of the general conspiracy, but rather indicates that he was working for his own purposes. Such a theft, if proven, would be a serious offense, but it is not the single conspiracy charged by this indictment.

Finally, the record shows that Jarnigan participated in taking FSFS furniture to various temporary storage places and from there to auctions. However, this, too, does not show knowledge of the scheme to disappear with the fruits of the auction thereby defrauding the creditors.

The case against Micciche is even weaker than that against Jarnigan. Basically, all that is shown is that Micciche participated in renting temporary storage facilities for the furniture and in transporting it to auctions. There was also some evidence that Micciche

purchased several cashier's checks for several thousand dollars during this period. However, the Government never tied the purchase of those cashier's checks in to the conspiracy itself.

It may be that Jarnigan and Micciche knew of the conspiracy. However, the indictment under which they were tried charges a knowing and intentional plan to conceal assets in contemplation of bankruptcy or to fraudulently transfer assets with the intent to defeat the bankruptcy laws. There is no evidence in this record from which a jury could find beyond a reasonable doubt that Jarnigan or Micciche knowingly and intentionally entered the conspiracy with the specific intent to defeat bankruptcy proceedings. The thrust of the evidence against these two might apply to any major employee of a distressed business. The rest, viewed cumulatively, is no more than suspicious and does not establish the essentials of an agreement with the principals to accomplish the unlawful objects as charged in the indictment which is necessary to sustain the conspiracy charge.

Accordingly, Nos. 75-1223 and 75-1224 are affirmed; Nos. 75-1220 and 75-1221 are reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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